Filed 7/28/09 P. v. Foster CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. KENREID CORNELL FOSTER, Defendant and Appellant.	H032597 (Santa Clara County Super. Ct. No. CC643470)

I. INTRODUCTION

Defendant Kenreid Cornell Foster was convicted after jury trial of two counts of aggravated sexual assault of a child under the age of 14 (Pen. Code, § 269)[1] and three counts of forcible lewd conduct on a child (§ 288, subd. (b)(1)). Defendant was sentenced to 48 years to life in prison.

On appeal, defendant contends that the trial court prejudicially abused its discretion when it denied his motion to continue sentencing so that he could investigate a motion for new trial. For reasons that we will explain, we determine that the court did not abuse its discretion and therefore we will affirm the judgment.

[1] All further statutory references are to the Penal Code unless otherwise indicated.

II. FACTUAL AND PROCEDURAL BACKGROUND

On July 31, 2007, defendant was charged by first amended information with two counts of aggravated sexual assault of a child under the age of 14 (§ 269 – counts 1 and 2) and three counts of forcible lewd conduct on a child (§ 288, subd. (b)(1) – counts 3, 4, and 5). The following evidence was presented at the trial in August 2007.

The Prosecution's Case

T. lived with defendant, who is her father, and with defendant's wife, who is her mother. At the time of trial, T. was 14 years old.

T. described the circumstances that would lead to discipline by defendant when she was growing up. For example, she would get in trouble with defendant if she did not play the piano or practice taekwondo. She would also be disciplined for lying. At times, she lied about whether she had practiced taekwondo or had done her homework. She acknowledged that defendant had punished her a lot for lying.

Discipline by defendant took various forms. He had given T. "timeout[s]," placed her on "restriction," and made her stand in a corner. On one occasion, T. stood in the corner for more than four hours. Defendant also disciplined T. by spanking her with his hand or a belt. She was hit on the buttocks, legs, "maybe" her back, and "[s]ometimes" her face. Defendant had used a leather belt, and T. had been struck by the belt buckle. Defendant used the belt if T. lied or "didn't do something," such as her homework. When T. was in the fourth grade, defendant hit her with the belt because she "wouldn't get the right answer" when she "was doing math." T. was afraid and crying. Her mother was in the house but not in the same room during the incident. T. did not say anything to her mother about it.

When T. was nine years old and in the fourth grade, she went to school with injuries to her face. After a teacher spoke with T., the police were called. T. was "[s]cared of what might happen" if she disclosed what had occurred because defendant had warned that "he would halfway kill" her if she told anyone. T. told San Jose Police

Officer Curtis Reeves that defendant had injured her the previous night and had threatened to kill her, and that she was afraid to go home. She also reported that her mother had told defendant not to hit her, and that her parents always argued whenever her mother said this to defendant. Officer Reeves observed redness below T.'s right eye and below her left temple. T. was sent to a shelter and then lived at a foster home for several months. She missed living with her mother during this period of time. T. resumed living with her parents when she was in the fifth grade.

T. started seventh grade when she was 12 years old. She would get in trouble for not playing the piano, not doing chores, and for telling a lie. She got in trouble the most over schoolwork.

Sometime during seventh grade, defendant did not allow T. to have friends because her grades were too low. T. and defendant attended a conference with T's teachers. Defendant was upset about T.'s grades. T. was afraid because she "didn't know what [defendant] was going to do" when they got home. T. acknowledged that after the conference, she did "[n]ot really" get in trouble. She tried to bring her grades up and her grades did improve thereafter.

T.'s math teacher had a separate conference with T. and defendant, who wanted T. to be placed in advanced math. T.'s teacher told defendant that T. had not been turning in her math homework. At the time, T. had been lying to defendant about turning in her homework.

At trial, T. admitted taking one of her mother's checks without permission. T. filled out the check for $30 to her middle school to cover the proceeds for a candy fundraiser but left the signature line blank. She later told her mother that she would get detention if the school did not receive payment, so her mother gave her money.

T. initially denied at trial that she had used her parents' credit cards to make online purchases without their permission. She later admitted to using her mother's credit card without her knowledge to purchase internet time. She also admitted that she had lied at

the preliminary hearing when she denied taking any credit cards and denied making purchases without permission.

T. had sex education in the sixth and seventh grades.

Defendant began touching T. inappropriately in 2006. T. initially told the police and testified at the preliminary hearing that it began in June when she was 13 years old, but she later testified at trial that it started in March when she was 12 years old.

The first time that it occurred was at night. T. was on the floor watching television and defendant was lying on the couch. T.'s mother was in her bedroom. Defendant asked T. to get on the couch, and she complied. It was not unusual for them to watch television together on the couch. On this occasion, while she was lying on the couch and watching television, defendant lay behind her with the front of his body against her back. T. was wearing a long t-shirt and pajama pants. Defendant draped his arm over her body and used his hand to touch her vagina over her clothing. T. asked him "what he was doing." He said "[n]othing" and moved his hand. T. got up and went to sleep with her mother in her mother's bed.

Defendant touched T.'s vagina over her clothing with his hand more than once. T. indicated that when the touching occurred, defendant's hand "moved" as opposed to "stay[ing] in one place." The touching always occurred in the family room.

Defendant also used his hand to touch T.'s vaginal area on her skin more than once. Each time, T. was afraid. When she tried to pull his hand away, he sometimes would stop touching her. Other times, he pushed her hand away. T. told him to " 'stop' " more than one time, but he did not always comply. Defendant also put his finger inside T.'s vagina more than one time.

Defendant warned T. that if she told anyone about the touching, he would go to jail and she would go to the shelter. T. did not want to go to a shelter again, but she also did not want her father to touch her. Defendant told T. that it was not going to happen anymore, but the touching continued and T. was afraid that it might happen at any time.

T. thought about telling someone the very first time that defendant touched her, but she did not. She did not tell her mother because she was afraid her mother would tell defendant and T. would "get in trouble." She also thought her mother would not believe her and would get mad at her. Further, she thought it would "hurt" her family, they would "be broken," and her father could lose his job. T. admitted that at the preliminary hearing, she also gave the following reasons for not telling her mother: T. did not want to be poor, she knew that defendant would go to jail and lose his job, her mother would have only one income and would be struggling because they had just bought a house, and T. would go into foster care or a shelter.

The last period of time during which defendant touched T. was in September 2006, when T. was 13 years old. On more than one day, while T.'s mother was in Philadelphia for a few days, defendant touched T.'s vagina area with his hand. On the very last occasion, defendant called T. into the family room, where he was sitting on the couch. Defendant removed all of his clothes and those covering the bottom part of T's body. T. was afraid. Defendant lay on the couch with T., rubbed her vagina, and put his finger in her vagina. T. tried to move his hand but was not able to overcome his strength. Defendant tried to take T.'s shirt off, but she "held it down." He touched her butt with his penis. He also asked her to touch his penis. When she did not comply, he used his hand to make her touch it. T. was able to pull her hand away after a "[s]hort time." T. saw defendant move his own hand on his penis, and a white substance came out and onto the couch. Defendant used a blanket to wipe it up.

Before T. went to school the next day, defendant yelled at her for not doing her taekwondo stretches and regarding her chores. It was not unusual for T. to get in trouble for these things. At school, T. told a teacher that she wanted to speak with her. T. stated: "The last time I said something to someone I ended up in foster care." T. stopped talking at that point, and the teacher took her to the vice principal's office. T. was embarrassed to disclose any details and indicated that she preferred to communicate in writing. After

being given paper, T. wrote that she had been touched in places that she knew were not "appropriate," the last time it happened was "last night," it "usually happens" when her mother is not at home, and it "occurs about every 2 to 3 days." T. also indicated in writing that she had been touched on her vaginal area. After reading what T. had written, the vice principal instructed T.'s teacher to call child protective services. T. talked to a police officer and was eventually taken to a shelter.

T. had approached her teacher because she trusted her and was angry at defendant. At trial, T. denied that she had made up what happened because she was mad at defendant, or so that defendant would not live with her and discipline her anymore.

On September 27, 2006, the day after being taken to a shelter, T. was interviewed by San Jose Police Officer Matty Hrncir.[2] T. was talkative while Officer Hrncir was building a rapport with her. Once they started discussing why T. was there, T. "closed down," her body "basically slumped down," she was "very sad," and she later started crying. T. described the first and last incidents involving defendant. T. indicated that the first incident occurred approximately two to three months prior to the interview. She reported that she had " 'kept telling him to stop.' " She eventually " 'jumped off the couch and went on to the floor.' " Defendant told her to get back on the couch, but T. went to her mother. Regarding what was happening to her, T. told Officer Hrncir: " 'I wanted to tell someone a long time ago, but then I couldn't.' "

Sometime after the interview with T., Officer Hrncir called T.'s mother to advise her that T. was in protective custody and that defendant was going to be arrested. T.'s mother did not ask Officer Hrncir what T. had to say or what evidence the police had against defendant. T.'s mother wanted to talk to defendant, so Officer Hrncir arranged a

[2] The interview was recorded but was not played at trial.

telephone call between defendant, who was in an interview room, and T.'s mother.[3] Officer Hrncir informed defendant that the call would be recorded.[4] During the call, T.'s mother asked defendant whether "[i]t is true." He responded, "[n]o." She asked, "why is this happening again, what's going on this thing[?]" Defendant replied that he could not tell her a "whole lot about it" at the moment. Defendant told her to complete her work assignment, not to "jeopardize" her job, and that he thought he would be "losing everything, [his] job." He also stated to her: "I guess that's gonna the uh, end of it, end of us, so I would kind of like to talk to you." T.'s mother told defendant that she loved "both" of them and she did not want "something happening to" defendant and T.

Officer Hrncir never formally interviewed T.'s mother.

After T. reported defendant's inappropriate touching, she was taken to a shelter and later placed in a foster home. She visits with her mother in a supervised setting. On one occasion, T. threatened not to visit her mother unless her mother restarted internet service for her telephone.

T. has " 'mixed feelings' " about defendant. When asked whether she still loves defendant, T. testified, "Some things about him are yes and some things about him are no." T. liked the fact that he sent her to karate at an early age, she sometimes liked the fact that they raised pigeons together, for a while she enjoyed the piano lessons that defendant required her to take, and she liked the fact that sometimes defendant would stay up late at night with her or play with her. She did not like the discipline by him and being hit by a belt.

---

[3] It is not clear from the record whether defendant had already been arrested. It is also not clear from the record how long after Officer Hrncir's telephone conversation with T.'s mother took place that the telephone call between T.'s mother and defendant occurred.

[4] The recorded conversation was played at trial, and the jury received a transcript of the recording.

Carl Lewis, a senior criminal investigator for the district attorney's office, testified as an expert about child sexual abuse accommodation syndrome (CSAAS). CSAAS encompasses five basic categories that are commonly present in child sexual abuse cases. First, secrecy reflects the fact that the abuse usually occurs when the offender is alone with the child, and the offender may communicate to the child that behavior must be kept a secret. Second, helplessness refers to the power imbalance between the offender and the child. Third, entrapment and accommodation reflect the child's suffering from ongoing abuse and the child's attempts to "put[] up with it." Fourth, delayed, conflicted, and unconvincing disclosure reflects the fact that the child's disclosure of abuse is usually not immediate, the child experiences internal conflict in determining whether to make the disclosure, and the disclosure is "often done in a way and a time when the child is least likely to be believed." Fifth, the child may retract an earlier disclosure because of the "chaos brought into the child's life" after the disclosure, such as the attention from law enforcement, child protective services, the criminal justice system, and the mental health field.

Lewis explained that CSAAS "is background information" that is intended to "disabuse us . . . from our preconceived ideas about child sexual abuse" and to "remind us . . . not to automatically rule out the possibility of sexual abuse just because of the way the information came forward." He also clarified that CSAAS is not a diagnostic tool that can be used to prove or disprove whether a child was molested in a particular case.

The Defense Case

T.'s seventh grade math teacher during the 2005 to 2006 school year testified at trial. The math teacher had a meeting with T. and defendant because defendant wanted T. placed in an advanced math class. T.'s math teacher did not believe T. was a "good candidate" for the class because she was missing several assignments "at basic pace" and thus "would have trouble succeeding in [the] accelerated class." When T.'s math teacher told defendant about the missing assignments, T. had a "deer in the headlights kind of

look" and appeared shocked or surprised that this information was being disclosed to defendant. Defendant was quiet and stern, and T. appeared "a little bit" fearful. T.'s math teacher testified that T. was not a discipline problem and that T. was not known by her to be dishonest.

T.'s physical education teacher, who was responsible for a school fundraiser, also testified at trial. T. reported to him that she had turned in proceeds from the fundraiser, but the school did not have a record of it.

In late April 2006, defendant complained to the assistant principal at T.'s school[5] that signatures from some of T.'s seventh grade teachers were missing from T.'s progress report. Defendant requested that each of T.'s teachers call him every time an assignment from T. was missing. The assistant principal told him that they "didn't do that at junior high." A few days later, defendant and T. attended a conference with the assistant principal and T's teachers. The assistant principal testified that T. was a "good student" who had "some problems in the third quarter" and that defendant was concerned about the grades "taking a dip." During the conference, defendant was "abrasive" and "control[led] most of the conversation," making it "difficult" for the assistant principal or the teachers to talk. T. was "cowed," "sat with her head down," and "seemed afraid, embarrassed," and "very uncomfortable." According to the assistant principal, the teachers also seemed uncomfortable and "almost afraid to talk." The assistant principal and the teachers were concerned for T. The assistant principal observed that defendant did not try to engage or seek a resolution with T. regarding what they could do about her performance. After the conference, however, T's grades did improve. The assistant principal testified that T. did not have any discipline problems, "was a solid, capable student," and did not have a reputation for dishonesty.

[5] A conditional examination of the assistant principal was conducted on August 7, 2007, and her testimony was later read to the jury.

T.'s mother testified that she had been married to defendant for nearly 16 years by the time of trial in 2007. T. was removed from her mother's care in September 2006, while her mother was on a business trip. Since that time, T.'s mother has been involved in a juvenile court proceeding regarding placement for T., who is currently living in a foster home.

T.'s mother described T. as a "happy girl" who loved karate, playing piano, and going to school. She stated that T. got a cell phone when she was eight years old.

T.'s mother stated that defendant is a "loving father" who is "concerned especially" about T.'s education. In characterizing him as a "strict disciplinarian," T.'s mother explained that defendant always wanted T. to do her homework as soon as she came home from school and wanted to make sure the work was completed. If T. did not finish her homework, defendant would "put her in the corner" and not let her "go out and play." Defendant would also put her in the corner and restrict her activities if she lied, because lying "really upset" defendant. When defendant learned that T. had lied about completing her homework, he got mad at T. and at T.'s mother for "not helping [him] get[] [T.] straight." T.'s mother would "cover[] up" for T. by telling defendant that she had completed all her homework because T.'s mother thought defendant was "hard" on T.

T.'s mother acknowledged that defendant used physical discipline on T., but she testified that she never observed it. In 2003, when T. was nine years old, T. was removed from her parent's care because she reportedly had bruises on her, including on her face. T.'s mother did not notice any bruises on T. when she took her to school that morning. She was aware that T. had stood in the corner for hours the night before, until almost midnight. She later learned that T. had been hit with a belt buckle. She acknowledged that T. was hit because she was not doing her math fast enough. Defendant called the shelter the night T. was removed and demanded that she be returned to him. Two days later, defendant, who was angry that T. had not been returned immediately, went to the

social services office with T.'s mother to talk to a social worker about T. The police were called during this visit. Ultimately, the dependency court determined that T.'s mother had failed to protect T. T. returned home after several months.

T.'s mother stated that she argued with defendant about him being a strict disciplinarian. For example, she would talk to him about placing T. in the corner "for an hour or so" when she failed to do her homework. T.'s mother told defendant that he was being " 'hard' " on T., that if T. did not want to do homework then defendant should " 'let it be,' " and he should let T. " 'learn from her own mistake.' "

T.'s mother admitted that defendant was "pretty hard" on T. about her stretching. Beginning when T. was in the middle of seventh grade, defendant required her to record her stretching in the morning with a camcorder. Although he told T.'s mother that the recording was so he could make sure that T. had done the stretching, he still made T. record herself when he was at home.

T.'s mother believed that T. had "a problem telling the truth at home" beginning in 2005 or 2006. She and defendant considered sending T to a psychiatrist because of her "lying habit." For example, T. lied about completing her homework and her chores. T. also denied knowing anything about her mother's missing credit card. Later, however, T.'s mother found the card in T.'s karate bag and unauthorized charges on the card. T. had also indicated to her parents that she wanted to be in a band, that practice would "be coming," and that her parents would need to sign some paperwork. A month later, when asked "what happened to the band," T. responded, "I don't know." T.'s mother believed that T. had lied about being in a band. T.'s mother also believed that T. lied about stealing her checks. When she questioned T. about a missing check and told T. that markings in her checkbook suggested that someone was trying to copy her signature, T. denied accessing the checkbook. T.'s mother later found the missing check in T.'s backpack. The check had T.'s handwriting on it but was not signed. T. also told her mother that she had lost, or someone had taken, the money that her mother had given her

for a school fundraiser and that she was being sent to detention. She asked her mother for a check to pay the school, and her mother gave her one for $30.

When T.'s mother visited T. after T. was removed from her care in 2006, T. stated that she would not visit her mother if she failed to turn on the media bundle for T.'s cell phone.

In 2006, T.'s mother and defendant had sex approximately four to six times a week. It usually took place in the bedroom, but "probably" once a month they had sex in the family room.

In late September 2006, T.'s mother went on a two-week business trip to Philadelphia. T.'s mother testified that on the night before she left, she had sex with defendant on the couch in the family room. Defendant ejaculated on the couch and then used a blanket to clean it. T.'s mother testified that during the following month, when the police were in her house, they informed her that "they were looking for any sperm that might be on the couch."

While T.'s mother was in Philadelphia, a social worker informed her by telephone that T. was being placed in protective custody because of a report about defendant's conduct with T. T.'s mother also received a telephone call from Officer Hrncir. During this call, T.'s mother did not inquire as to what T. had said. After being told by Officer Hrncir that defendant would not talk to the police, T.'s mother asked whether she could talk to defendant. She thereafter spoke with him more than once. During the first telephone call, T.'s mother was upset and crying. During another call defendant told her that T. had "got in trouble that morning because she wouldn't stretch." T.'s mother testified that she did not immediately return home because there was nothing she could do about T. and defendant being in custody. She also had to finish her business trip or else risk trouble with her job, she needed time to compose herself and determine how she was going to handle "the worst nightmare in [her] whole life," and her sister-in-law and defendant had told her to stay in Philadelphia and finish her work.

T.'s mother testified that she was not aware of anything inappropriate going on between T. and defendant. She stated that the dependency court and a social worker did not allow her to talk to T. about the substance of T.'s accusations against defendant.

In February 2007, T.'s mother told a defense investigator that there was " 'no way' " defendant " 'had any kind of sexual contact with [T.]' " However, in May 2007, she told the family court that she believed T. and not defendant. At defendant's trial in August 2007, she indicated that she believed that there had been sexual contact between T. and defendant. She stated that she was supporting T. because she wanted to keep the family together and that was "the most important outcome."

The Stipulations

The parties stipulated that defendant was born on May 6, 1950. The parties also stipulated that the jury would receive the narrative portion of a San Jose police report that was prepared by Officer Dan Lezotte. According to the report, Officer Lezotte went to a social services office in 2003 after receiving a report of an "irate parent whose child was taken into protective custody." After arriving at the office, he "monitor[ed]" defendant, T.'s mother, and a social worker from an adjoining room for approximately one hour. During this period of time, defendant asserted that "the system was against him because he is black." He also made other statements that Officer Lezotte interpreted as threats by defendant to harm himself and others. For example, defendant stated that "he would not be heard from again if his daughter was not returned to him immediately and . . . he would make a statement that everybody would eventually hear." Defendant also told T.'s mother that "after today she would never see him again because she had chosen their daughter over him." When defendant started yelling at the social worker, the police interceded.

The Verdicts

On August 15, 2007, the jury found defendant guilty of two counts of aggravated sexual assault of a child under the age of 14 (Pen. Code, § 269 – counts 1 and 2) and

three counts of forcible lewd conduct on a child (§ 288, subd. (b)(1) – counts 3, 4, and 5). Defendant waived time for sentencing. The matter was referred to the probation department for a report and set for sentencing in October 2007.

The sentencing hearing was subsequently continued to January 30, 2008, to accommodate a motion for new trial that defendant apparently anticipated filing.

Defendant's Motion for Continuance

On January 28, 2008, defendant filed a motion to continue sentencing until March 12, 2008. In a supporting declaration, defense counsel explained that the defense at trial was that T. had fabricated all the allegations against defendant. To refute T.'s allegations, defendant relied in part on his wife, who is T.'s mother, to "shed light" on T.'s history of lying. During the prosecutor's cross-examination, however, T.'s mother admitted to stating "in a pending dependency court proceeding . . . [that] she believed her daughter's allegations against her husband." She also acknowledged at defendant's trial that she believed T.'s allegations. According to defendant, T.'s mother's testimony that she believed T.'s allegations damaged the defense and "allowed the jury to ignore all the inconsistencies and admissions of untruthfulness" by T. and made the jury "inclined to believe" T.'s allegations. Defense counsel acknowledged that on December 26, 2007, after the criminal trial, T.'s mother "again confirmed under oath" while represented by counsel in a hearing in dependency court "that she does in fact believe her daughter's allegations" against defendant.

Defense counsel asserted that T.'s mother's testimony that she believes T.'s allegations contradicted statements that she made to defendant or his representatives, including the defense investigator, prior to trial. According to defense counsel, defendant "believes that there has been a concerted effort by the social worker in the dependency case to affect [T.'s mother's] testimony by either indicating, and/or strongly implying that unless [T.'s mother] said that she believes her daughter's allegations [she] would not be regaining custody of her daughter." In other words, defendant believed that "the events

in the dependency court, and specifically the efforts of the social worker in that case, [a]ffected [T.'s mother] testimony" in the criminal case against him. If the social worker engaged in a "concerted effort . . . to tamper" with T.'s mother's testimony on this point, and in view of the "importance" the jury placed on T.'s mother's belief regarding the allegations, defendant believed that "at the very least, a new trial should be granted."

Defense counsel stated that he filed a petition under Welfare and Institutions Code section 827 in the dependency court to obtain transcripts of the December 26, 2007 dependency hearing, information about T.'s mother's testimony in that hearing, information about T.'s mother's prior statements in the dependency court concerning her belief of T.'s allegations, and permission to interview the social worker, Ms. Anderson, regarding her interactions with T.'s mother. Counsel stated that the hearing on the petition in the dependency court was scheduled for February 8, 2008. He requested that sentencing by the criminal court be continued for approximately 45 days to allow time for the dependency court to make its ruling and, if the petition was granted by the dependency court, time for the requested information to be produced.

Hearing on Motion for Continuance and Sentencing by the Trial Court

On January 30, 2008, the date set for sentencing, the parties appeared before the trial court. The court asked defense counsel whether the reasons outlined in the motion to continue "indicate the basis for" defendant's contemplated motion for new trial. Defense counsel replied affirmatively. He stated that defendant believed that T.'s mother "was . . . tampered with and that the social worker," Ms. Anderson, who was present, "either stated directly or strongly implied that unless [T.'s mother] indicated that she was believed [T.] and disbelieved defendant in terms of the allegations, . . . [her] parental rights or custody of her child would be significantly impaired or curtailed and possibly she [would] lose those rights." Further, defendant believed that "the entire process of forcing the mother to choose affected the way she testified on the witness stand."

The trial court stated that it could "probably make a ruling" on the motion to continue and the contemplated motion for new trial "summarily," and that it was "trying to focus" on both because it wanted to "move this case forward, if it's appropriate to do that . . . ."

Regarding the contemplated new trial motion, the court stated: "it's basically -- I'm presuming -- it's based on insufficiency of the evidence, based on credibility of witnesses, which you outline in your motion, that the thrust of the defense was that the daughter, [T.], was lying. And then the mother," after a strong cross-examination by the prosecutor, "recanted her statement that she gave to the investigator who was hired by the defense. Although she had had three different hearings . . . , two of which were under oath, . . . that she said that she believed her daughter." The court referred to section 1181, stated that a new trial may be granted when the verdict is contrary to law, and described the standard to be applied in determining whether substantial evidence supports a verdict.

The trial court observed that the jury had to weigh the credibility of T. and her mother in order to reach its verdict. The court characterized the "focus and thrust" of defendant's motion to be the credibility of T.'s mother, who told defendant and his representative that she did not believe T. but who had also stated at three different hearings, twice under oath, that she did believe T. The court found T. "very credible" and also thought that defense counsel did a "thorough job" in bringing out the inconsistencies in T.'s testimony. The court believed that the jury heard and weighed those inconsistencies but, in view of its verdicts, "gave little substance to [defense counsel's] cross-examination of those inconsistencies." The court explained that generally, evidence that "merely impeaches a witness[] is not significant enough to make a different result probable," which was what defendant was "asking here in [his] motion for new trial." The court concluded: "Based upon what you outlined here -- very clearly for me, and I really appreciate it. What the basis for your new trial is -- I'll deny your

motion for continuance and deny your motion for new trial." The court stated that it was "ready to go forward with sentencing."

Later, defense counsel attempted to summarize the trial court's ruling. Defense counsel stated: "[T]he 827 petition was filed. . . . I understand the court's decision, that basically says, even if we get all of the records and even if we are able to show something, the basis that we are claiming a potential motion for new trial, based upon what has been presented in the declaration and how mom previously testified on multiple occasions, once with assistance of counsel, is not enough." The court agreed with counsel's summary, stating "That is specifically my ruling." Defense counsel informed the court that defendant was "asking for 45 days to simply get the records to see what they do show." The court responded, "I understand. I'm very clear about what [defendant's] request is." Later, the court stated to defendant: "I'm denying your motion for new trial, your continuance -- first of all, to get the information that's been requested, but as [defense counsel] also outlined, giving what is in your motion for a continuance, which outlines your basis for new trial, even if I had received that information, my ruling would have been the same because of the thrust of what your motion for new trial would have been. I've stated on the record my ruling on that. So I'm ready to go forward with this."

The trial court then proceeded to sentence defendant to 30 years to life consecutive to 18 years in prison. The sentence was calculated as follows: two consecutive terms of 15 years to life for counts 1 and 2, aggravated sexual assault of a child, and three consecutive midterms of six years each for counts 3, 4, and 5, forcible lewd conduct on a child. The court awarded defendant 565 days of custody credits and ordered him to pay various fines and a fee.

Defendant filed a timely notice of appeal on February 8, 2008.

III. DISCUSSION

On appeal, defendant contends the trial court abused its discretion in denying the motion to continue sentencing.

First, defendant argues that the underlying, proposed new trial motion was based on newly discovered evidence, but the court considered the basis of the proposed motion to be insufficiency of the evidence to support the verdict. Consequently, the court "veered off course" when it considered the question of whether the continuance would be useful. Defendant maintains that the "issue" he raised "was not whether the evidence was insufficient in light of the inconsistencies in the testimony of the witnesses as the court considered. Rather, the issue was whether [T.'s mother] . . . was coerced into giving false testimony against [him] by the juvenile authorities." Further, the court "prevented" him "from actually developing the evidence in support of his motion," even though the social worker, Ms. Anderson, "was in court and available to testify." Thus, the court "could not properly weigh the probative value of evidence it did not even hear."

Second, defendant asserts that "it is reasonably probable that the outcome [of the trial] would have been different if the jury had been presented with evidence that [T.'s mother's] testimony was coerced."

A continuance in a criminal proceeding "shall be granted only upon a showing of good cause." (§ 1050, subd. (e).) A trial court has broad discretion in determining whether good cause exists for a continuance. (*People v. Riggs* (2008) 44 Cal.4th 248, 296.) One factor for consideration is whether the continuance would be useful. (*People v. Frye* (1998) 18 Cal.4th 894, 1013, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421 & fn. 22 (*Doolin*).) The court considers " ' " 'not only the benefit which the moving party anticipates but also the likelihood that such benefit will result . . . .' " ' " (*Doolin*, *supra*, 45 Cal.4th at p. 450.) A continuance is properly granted to permit a defendant to investigate exculpatory evidence. (*People v. Gatlin* (1989)

209 Cal.App.3d 31, 40-41.) However, the speculative nature of what is to be gained by a continuance justifies its denial. (*Id.* at pp. 41-42.)

On appeal, the "reviewing court considers the circumstances of each case and the reasons presented for the request to determine whether a trial court's denial of a continuance was so arbitrary as to deny due process. [Citation.] Absent a showing of an abuse of discretion and prejudice, the trial court's denial does not warrant reversal. [Citation.]" (*Doolin*, *supra*, 45 Cal.4th at p. 450.)

In this case, defendant contends that he sought a continuance in order to investigate a motion for new trial based on newly discovered evidence. A new trial may be granted "[w]hen new evidence is discovered material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial. When a motion for a new trial is made upon the ground of newly discovered evidence, the defendant must produce at the hearing, in support thereof, the affidavits of the witnesses by whom such evidence is expected to be given, and if time is required by the defendant to procure such affidavits, the court may postpone the hearing of the motion for such length of time as, under all circumstances of the case, may seem reasonable." (§ 1181, subd. (8).)

The trial court must consider the following factors in ruling on a new trial motion based on newly discovered evidence: " ' "1. That the evidence, and not merely its materiality, be newly discovered; 2. That the evidence be not cumulative merely; 3. That it be such as to render a different result probable on a retrial of the cause; 4. That the party could not with reasonable diligence have discovered and produced it at the trial; and 5. That these facts be shown by the best evidence of which the case admits." ' [Citations.]" (*People v. Delgado* (1993) 5 Cal.4th 312, 328 (*Delgado*).)

On appeal, defendant asserts that his trial counsel "requested a continuance to continue his investigation of the possible new trial." According to defendant, his trial counsel "stated the intention to file a [new trial] motion on the basis of newly discovered

evidence," but the trial court "chose to consider the [new trial] motion on a different ground, that [defendant] was seeking to establish that the verdict was not supported by sufficient evidence."

As an initial matter, to the extent that defendant asserts that the trial court's comments at the January 30, 2008 hearing suggest a misunderstanding on the part of the court as to the basis for defendant's contemplated new trial motion, we observe that defendant's trial counsel never corrected the court during the hearing or advised the court that the court did not understand the basis for defendant's contemplated new trial motion. Indeed, after the court made its ruling, the following exchange took place between defendant's trial counsel and the court.

"[DEFENSE COUNSEL:] I understand that the court is -- the 827 petition was filed. The notices went out on January 2nd. I learned about the mother's testimony on January 29th. I understand the court's decision, that basically says, even if we get all of the records and even if we are able to show something, the basis that we are claiming a potential motion for new trial, based upon what has been presented in the declaration and how mom previously testified on multiple occasions, once with assistance of counsel, is not enough. Is that the court's --

"THE COURT: That is specifically my ruling.

"[DEFENSE COUNSEL]: All right. I understand that. [¶] [Defendant] is, for the court's information, asking for 45 days to simply get the records to see what they do show.

"THE COURT: I understand. I'm very clear about what [defendant's] request is."

Based on our review of the record, including the above quoted portion, we do not believe that the trial court misunderstood the basis for defendant's contemplated new trial motion. The court initially characterized defendant's contemplated new trial motion as being "based on insufficiency of the evidence, based on credibility of witnesses," stated that a new trial may be granted when the verdict is contrary to law, and described the

standard to be applied in determining whether substantial evidence supports a verdict. However, the court also discussed several cases that it had reviewed "before and after" reading defendant's motion for a continuance, including *Delgado, supra,* 5 Cal.4th 312, *People v. Beyea* (1974) 38 Cal.App.3d 176 (*Beyea*), and *People v. Green* (1982) 130 Cal.App.3d 1 (*Green*). These cases address whether a motion for new trial based on the ground of newly discovered evidence should have been granted. (*Delgado, supra,* 5 Cal.4th at pp. 328-329; *Beyea, supra,* 38 Cal.App.3d at pp. 201-203; *Green, supra,* 130 Cal.App.3d at pp. 9-12.)

In discussing *Beyea* and *Green* in particular, the trial court in the case before us referred to some of the factors to consider in determining whether defendant's proffered evidence would make a different result "probable" in a new trial. For example, the court stated: "As a general rule of evidence, [that] which merely impeaches a witness[] is not significant enough to make a different result probable. [¶] That's what you're asking here in your motion for new trial." As defendant recognizes in his opening brief on appeal, whether the proffered evidence would " ' "render a different result probable on a retrial" ' " is one factor to consider in evaluating a motion for new trial based on newly discovered evidence. (*Delgado, supra,* 5 Cal.4th at p. 328.)

Defendant asserts that his claim in the trial court "was that his wife testified inconsistently because she was coerced into doing so by the juvenile authorities." He emphasizes that the issue the trial court should have considered was whether T.'s mother was *coerced* into giving false testimony and "not whether the evidence was insufficient in light of the inconsistencies in the testimony of the witnesses." He also argues that the trial court precluded him from developing evidence of T.'s mother's coercion and thus it could not properly weigh its probative value.

Defendant fails to show error by the trial court in these respects. The trial court necessarily had to consider the credibility of the trial witnesses, including T. and her mother, and any inconsistencies in their testimony in order to determine whether the

proffered testimony—that coercion caused T.'s mother to make inconsistent statements about whether she believed T.'s allegations—would render a different result probable on retrial. Further, in undertaking this analysis, the court did not require defendant to provide evidence of T.'s mother's coercion because the court focused on whether, if evidence of coercion *was* discovered and presented on retrial, it would have made a different result probable. It was thus unnecessary for defendant, and he was not prejudiced by the lack of opportunity, to develop evidence of coercion in support of the motion.

In sum, based on our review of the record, we believe that the court understood the basis for defendant's contemplated new trial motion.

Next, defendant contends that the denial of his motion for a continuance, so that he could investigate a new trial motion, was prejudicial. With respect to the underlying, proposed motion for new trial, he asserts that "it is reasonably probable that the outcome [of the trial] would have been different if the jury had been presented with evidence that [T.'s mother's] testimony was coerced." In this regard, defendant explains that "[t]he jury was presented evidence that [T.] had lied on numerous occasions" but "found that the balance of evidence tipped in favor of [T.'s] accusations." According to defendant, "if the jury learned that the juvenile authorities felt compelled to coerce [T.'s mother] into vouching for [T.'s] credibility, it is reasonably probable that this revelation would have tipped the balance in favor of" him.

The Attorney General responds that T.'s mother "was a witness for the defense not the prosecution. The prosecution's case turned on the credibility of [T]. The defense case was based on the theory that [T.] was untruthful; a theory supported almost exclusively by [T.'s mother's] testimony that [T.] had a problem with lying. Accordingly, even if the defense was able to uncover evidence that [T.'s mother's] trial testimony was somehow coerced, such evidence would not have undermined the

prosecution's case. It would have only undermined the credibility of the primary defense witness."

The California Supreme Court has stated that " 'a motion for a new trial should be granted when the newly discovered evidence contradicts the strongest evidence introduced against the defendant . . . .' " (*Delgado, supra*, 5 Cal.4th at p. 329, quoting *People v. Martinez* (1984) 36 Cal.3d 816, 823.) Further, " 'the trial court may consider the credibility as well as materiality of the evidence in its determination [of] whether introduction of the evidence in a new trial would render a different result reasonably probable.' [Citation.]" (*Delgado, supra*, 5 Cal.4th at p. 329.) In determining whether the proffered evidence would have rendered a different result probable, the trial court and the appellate court must "determine whether the inability of the defendant to present the evidence in question prejudiced the outcome of the trial. In viewing such an issue, we justifiably accord considerable deference to the trial judge 'because of "his [or her] observation of the witnesses, [and] his [or her] superior opportunity to get 'the feel of the case.' " [Citation.]' [Citation.]" (*People v. Hayes* (1985) 172 Cal.App.3d 517, 524-525.)

Here, we believe that the trial court reasonably concluded that the proffered evidence – that T.'s mother was coerced into saying that she believed T.'s allegations – would not have rendered " ' "a different result probable on a retrial of the cause." ' " (*Delgado, supra*, 5 Cal.4th at p. 328.) The jury had to weigh the credibility of both T. and her mother. The court observed that T. was "very credible." It also thought that defense counsel did a "thorough job" in bringing out the inconsistencies in T.'s testimony. The court explained that the jury heard and weighed those inconsistencies but, in view of its verdicts, "gave little substance to [defense counsel's] cross-examination of those inconsistencies."

Regarding T.'s mother's credibility, the trial court characterized the prosecutor's cross-examination of her as "strong." Even defendant's trial counsel acknowledged in a

declaration in support of the motion for a continuance that T.'s mother "gave several conflicting answers on the witness stand concerning a variety of topics" and the prosecutor "did a very effective cross-examination of [her] that seriously undermined the credibility of some of her answers." Indeed, during argument to the jury, defendant's trial counsel stated that "most of [T.'s mother's] testimony was unbelievable. Then [the prosecutor] got her on cross and went after her very well. I will acknowledge she went after her very well." Under these circumstances, defendant's proffered evidence that T.'s mother had been coerced into recanting an earlier statement about her disbelief of T.'s allegations would not necessarily have rehabilitated T.'s mother's credibility and weakened T.'s credibility in the eyes of the jury.

Moreover, the trial court pointed out that although T.'s mother had earlier told defendant and/or a defense investigator that she did not believe T.'s allegations, her subsequent statement that she did believe T. occurred at three different court hearings, and in two of those hearings, she was under oath. Hence, if defendant established on retrial that she had been coerced into falsely stating that she believed T.'s allegations, that would have meant she lied under oath during defendant's trial and during at least one other court proceeding when she stated that she believed T. This in turn would only raise *further* questions about her credibility in a retrial. (See *Green*, *supra*, 130 Cal.App.3d at p. 11 [generally " 'evidence which merely impeaches a witness is not significant enough to make a different result probable' "].)

In addition, the inference that T.'s mother's testimony was being affected by personal considerations or outside influences had already been raised during defendant's trial. T.'s mother testified that she was supporting T. because she wanted to keep the family together and that was "the most important outcome." Thereafter, during argument to the jury, defendant's trial counsel stated: "[T.'s mother] wants her family to be together -- [the prosecutor] and I both agree on this -- she wants her family to be together. She doesn't want anybody to believe there [are] problems in that household. But when

she is pushed by somebody who is looking for answers, be it my investigator, be it [the prosecutor] or be it the judge in the family dependency court, she basically tells people what they want to hear." Later, defendant's trial counsel argued to the jury: "[T.'s mother] said to the judge in dependency court, who, by the way, has the power to prevent her from seeing her daughter, 'All right. I believe [T.]' [¶] According to [the prosecutor], 'When she was pinned down.' This is a judge who has a power to decide whether she can see her daughter. She is telling anybody who asks her what she thinks the questioner wants to hear."

In view of the trial testimony and the arguments made to the jury, the new evidence proffered by defendant concerning the coercion of T.'s mother by "juvenile authorities" would have done nothing more than corroborate evidence and reiterate theories that a jury would have already heard, rather than seriously undermine the prosecution.

Lastly, the issue of whether *T.'s mother believed* T.'s allegations and whether she had been coerced into falsely testifying about her belief was collateral to the main issue in the case, that is, whether defendant had actually engaged in inappropriate conduct with T.

In sum, T.'s testimony was the strongest evidence introduced against defendant and defendant's proffered evidence would have only undermined the credibility of one of his own witnesses, T.'s mother, on a collateral point. In view of the record in this case, we believe that the trial court reasonably concluded that defendant's proffered evidence concerning the alleged coercion of T.'s mother was not " ' "such as to render a different result probable on a retrial" ' " of the matter. (*Delgado, supra,* 5 Cal.4th at p. 328.) Accordingly, in the absence of any likelihood that defendant would be successful on a new trial motion based on evidence that T.'s mother had been coerced, we determine that the trial court did not abuse its discretion in denying defendant's motion to continue

sentencing to further investigate such evidence and that defendant was not prejudiced thereby.

IV. DISPOSITION

The judgment is affirmed.

_____

BAMATTRE-MANOUKIAN, ACTING P.J.

WE CONCUR:

_____

MIHARA, J.

_____

MCADAMS, J.